

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000064-001 DT

09/24/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

BRYAN FOLEY

MATHIS BECKER

v.

MARICOPA COUNTY SHERIFF'S OFFICE
(001)
JOSEPH ARPAIO (001)
MARICOPA COUNTY SHERIFFS SUN CITY
POSSE (001)
MARICOPA COUNTY BOARD OF
SUPERVISORS (001)

REBECCA SALISBURY
JOHN GREG COULTER

MINUTE ENTRY

This Court has jurisdiction of this Special Action pursuant to the Arizona Constitution Article, VI., Section 18 and Rule 4(b), Rules of Procedure for Special Actions. This case has been under advisement and the Court has considered and reviewed the Petition for Special Action, the Motion for Order to Show Cause, Motion to Dismiss, and all responses thereto together with the memoranda and supporting documents submitted by counsel.

The exercise and acceptance of special action jurisdiction by an appellate court is highly discretionary,¹ and therefore, the decision to accept jurisdiction encompasses a variety of determinants.² Special action jurisdiction by an appellate court is appropriate where an issue is one of first impression of a purely legal question, is of statewide importance, and is likely to arise again. Additionally, special action jurisdiction may be assumed to correct a plain and obvious error committed by a lower court or administrative agency,³ and may be considered when there is no equally plain, speedy, or adequate remedy by way of appeal.⁴

¹ *Blake v. Schwartz*, 202 Ariz. 120, 42 P.3d 6 (App. 2002); *Haas v. Colosi*, 202 Ariz. 56, 40 P.3d 1249 (App. 2002).

² *State v. Jones ex rel. County of Maricopa*, 198 Ariz. 18, 6 P.3d 323 (App. 2000).

³ *Amos v. Bowen*, 143 Ariz. 324, 693 P.2d 979 (App. 1984).

⁴ *Schwartz*, 202 Ariz. 120, 42 P.3d 6; *State ex rel. Romley v. Superior Court*, 198 Ariz. 164, 7 P.3d 970

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In this matter, special action jurisdiction will be accepted and exercised by this court to resolve a purely legal question concerning whether Plaintiff has a constitutionally protected property interest in continued service as a volunteer.

Factual and procedural history

Bryan Foley was a volunteer member of the Sheriff's Posse of Sun City for many years and was also an instructor and member of the Maricopa County Sheriff's Posse.⁵ At all times, he has acted as a volunteer in both capacities in both organizations. All Sheriff's posse members are volunteers. Members, including Foley, do not receive any pay or benefits beyond coverage under workers' compensation and the County's self-insured liability program while performing directed duties.⁶ Members serve at the discretion of the Maricopa County Sheriff.⁷ In September, 2002, Foley received letters from the Sheriff's Posse of Sun City advising him that a complaint had been filed against him and a hearing had been scheduled before the Sun City Posse's Board of Governors regarding allegations that he had possessed confidential personnel information of another Sun City Posse and Board member.⁸ A hearing was scheduled for October 18, 2002 and an additional allegation was added.⁹ Hearings were conducted at which plaintiff had varying degrees of participation.¹⁰ After investigation, Plaintiff was terminated from service with the Maricopa County Sheriff's Posse.¹¹ On October 21, 2002, The Board of Governors of the Sheriff's Posse of Sun City notified Foley that the board had terminated his membership in their organization, too.¹² Plaintiff filed a Special Action and Motion for Order to Show Cause in which he seeks a preliminary and permanent injunction enjoining the Defendants from enforcing Plaintiff's termination from the Sun City Posse or the Maricopa County Sheriff's Posse.

Plaintiff contends that the Defendants violated his right to procedural due process in terminating him from his posse service. In addition, Plaintiff contends that Defendants failed to comply with their own policies and procedures in terminating his service and that such failure creates a constitutionally protected property interest. Defendants respond that they did in fact

(App. 2000); *Luis A. v. Bayham-Lesselyong ex rel. County of Maricopa*, 197 Ariz. 451, 4 P.3d 994 (App. 2000).

⁵ Plaintiff's Petition for Special Action ("Plaintiff's Petition"), ¶ II; Plaintiff's Response to Motions to Dismiss, March 28, 2003. page 2.

⁶ Defendant's Motion to Dismiss, attached Affidavit of Lieutenant Thomas Tyo, paragraph 3, February 27, 2003, Sheriff's Posse Program Policy GS-7, paragraph 9.

⁷ Defendant's Motion to Dismiss, attached Affidavit of Lieutenant Thomas Tyo, paragraph 3, February 27, 2003.

⁸ Plaintiff's Motion for Order to Show Cause, January 31, 2003, page 3.

⁹ *Id.*, at 2.

¹⁰ Plaintiff's Response to Motions to Dismiss, pages 2-5, and attached Transcript.

¹¹ Plaintiff's Petition, Exhibit G, Letter to Foley from Lieutenant Tom Tyo, Deputy Commander, Maricopa County Sheriff's Office, November 13, 2002.

¹² Plaintiff's Petition, Exhibit H2, Letter to Foley from Robert V. Will, Attorney for the Sheriff's Posse of Sun City, October 21, 2002.

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follow appropriate procedures and that as a volunteer, Plaintiff does not have a constitutionally protected property interest in continued service. The narrow issue addressed by this Court in this Special Action is whether as a volunteer, Foley has any due process rights in continued volunteer service.

Discussion

Assuming a recognized property interest, procedural due process requires a hearing at which the protected party can invoke his claim of entitlement.¹³ However, plaintiff must establish that he has an identifiable protected property interest in order to state a claim for violation of procedural due process.¹⁴ Arizona courts have not addressed the question whether service as a volunteer creates a cognizable property interest. Other jurisdictions have concluded that, absent other considerations, there is no recognized constitutionally protected property interest in continuation of volunteer status.¹⁵ “[V]olunteer status . . . does not amount to a constitutionally protected property interest.”¹⁶ Under Arizona law, at-will employment alone does not create a protected property interest.¹⁷ In *Hyland v. Wonder*, the Ninth Circuit reasoned that because non-civil service employees have no property interest in continued employment under California law, a volunteer’s claim to a protected right in continued service similarly would not be recognized.¹⁸ The same conclusion follows from the Arizona cases that fail to recognize a property interest in at-will employment. Plaintiff’s interest as a volunteer is a lesser interest than that of an at-will employee and cannot create a greater constitutional protection. Plaintiff has not presented persuasive authority to the contrary.¹⁹

Plaintiff argues that the Defendants failed to follow their established procedures in terminating his volunteer membership and that this failure creates a protected property interest.²⁰ Assuming *arguendo* that the Defendants did not follow their internal policies and procedures in terminating Plaintiff’s posse membership, Plaintiff nonetheless cannot claim a protected property

¹³ *Perry v. Sindermann*, 408 U.S. 593, 603, 92 S.Ct.2694 (1972).

¹⁴ *Wallace v. Casa Grande Union High School Dist. No. 82 Bd. Of Governors*, 184 Ariz. 419, 909 P.2d 486 (App. 1995).

¹⁵ See, e.g., *Hyland v. Wonder*, 972 F.2d 1129, 1140 (9th Cir. 1992) *Hyland* also involved a claimed violation of plaintiff’s First Amendment rights and plaintiff prevailed on that ground. That aspect of the opinion is inapposite to the present case. The Ninth Circuit affirmed the District Court’s finding that Plaintiff failed to state a claim of denial of due process because he lacked an identifiable property interest in his retention as a volunteer.

¹⁶ *Id.*

¹⁷ *White v. Superior Court in and For Pima County*, 25 Ariz. 438, 544 P.2d 262 (App. 1975); *Carroll v. Robinson*, 178 Ariz. 453, 874 P.2d 1010 (App. 1994); *Wallace v. Casa Grande Union High School Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 909 P.2d 486 (App. 1995).

¹⁸ *Hyland*, 972 F.2d at 1141.

¹⁹ *Rowland v. Union Hills Country Club*, 157 Ariz. 301, 757 P.2d 105 (App. 1988) is based on a contractual right and does not involve a due process claim. *Maxwell v. Bell*, 121 Ariz. 475, 591 P.2d 567 (App. 1979) and *Scottsdale Jaycees v. Superior Court of Maricopa County*, 17 Ariz. App. 571, 499 P.2d 185 (1972) both stand for the proposition that liability may be imposed upon an organization for the actions of its volunteers. They do not address nor support a volunteer’s due process right to continued volunteer status.

²⁰ Plaintiff’s Response to Motions to Dismiss, March 28, 2003, *passim*.

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interest. In *Cleveland Board of Education v. Loudermill*,²¹ the Supreme Court made it clear that a substantive property right cannot be created by the procedures provided for its determination:

[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. . . “Property” cannot be defined by the procedures provided for its deprivation any more than can life or liberty.²²

It is well-recognized that a substantive property right cannot exist exclusively by virtue of a procedural right.²³ Accordingly, whether Defendants complied with internal procedures and policies is immaterial to Plaintiff’s due process claim if he does not otherwise have a cognizable property interest. As a volunteer, Plaintiff had no property interest in continued volunteer status. Because Plaintiff’s claimed property interest is based solely on alleged procedural guarantees established by the Maricopa County Sheriff’s Office and the By-laws of the Sheriff’s Posse of Sun City, his claim under the due process clause must fail.

Plaintiff also contends that his termination from posse membership created a liberty interest invoking constitutional protection of due process. To implicate constitutional liberty interests, the reasons for dismissal must be serious enough to stigmatize the individual with respect to other employment opportunities.²⁴ “The stigma imposed must be severe and genuinely debilitating before the discharge can rise to a level of constitutional concern.”²⁵ Plaintiff’s mere claim that “the termination notices failed to state why Plaintiff was terminated” falls far short of the seriousness required to create a liberty interest.²⁶

Conclusion

As a volunteer, Plaintiff does not have a recognized property interest in continued volunteer service. Whether Defendants failed to comply with their internal policies and procedures is immaterial to Plaintiff’s constitutional claim because such policies cannot create a property interest that does not otherwise exist. Plaintiff has not alleged facts that would support a liberty interest invoking due process protection. For all these reasons, this Court concludes that

²¹ 470 U.S. 532, 105 S.Ct. 1487 (1985).

²² *Id.* 105 S.Ct at 1493.

²³ *Dorr v. Butte County*, 795 F.2s 875, 877 (9th Cir. 1986)(Because employee discharged from the county sheriff’s department was at-will employee, personnel rules could not establish a property interest.); *See also, Henderson v. Sotelo*, 761 F.2d 1093, 1097 (5th Cir. 1985)(Violation of procedures upon which removal of public employee is conditioned would not create a property interest which otherwise did not exist.); *Hughes v. Whitmer*, 714 F.2d 1407, 1413-14 (8th Cir. 1983)(Whether transfer of police officer violates regulations was immaterial to procedural due process claim which turned on existence of protected property interest).

²⁴ *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707 (1972).

²⁵ *Hyland v. Wonder*, 972 F.2d at 1141.

²⁶ Plaintiff’s Response to Motions to Dismiss, page 11.

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the Plaintiff, Bryan Foley, has not asserted a claim that rises to the level of constitutional protection and that Plaintiff has failed to state a claim as a matter of law.

IT IS THEREFORE ORDERED granting Defendants' Motion to Dismiss.

IT IS FURTHER ORDERED denying all relief requested by the Plaintiff.

IT IS FURTHER ORDERED that counsel for Defendants shall lodge an order consistent with this opinion no later than October 30, 2003.